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7779

In the Supreme Court
of the State of Utah

OGDEN CITY, a Municipal Corporation,
Plaintiff,

vs.

FERRELL H. ADAMS, State Treasurer of Utah,
Defendant.

Case No. 7779

DEFENDENT'S BRIEF

FILED
JAN 31 1952
Clerk, Supreme Court, Utah

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In the Supreme Court
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vs.

FERRELL H. ADAMS, State Treasurer of Utah,
Defendant.

Case No. 7779

DEFENDANT'S BRIEF

STATEMENT OF FACTS

Inasmuch as plaintiff has included in its Statement of Facts certain information which is not contained in the pleadings, defendant deems it advisable to make a separate Statement of Facts.

In the interest of clarity and to arrive at the true state of facts upon which the Court must determine this

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case, Defendant will follow Plaintiff's Statement of Facts.

1. In paragraph 1, page 1, Plaintiff's Brief, Plaintiff points out that during the period of March 31, 1951, to August 27, 1951, five criminal actions, each with more than one defendant, for violation of Section 46-0-237, Utah Code Annotated 1943, were prosecuted in Weber County, State of Utah. Said criminal actions were successfully prosecuted and substantial funds resulted as fines and forfeitures. There is no evidence in the record as to the other facts contained in said paragraph 1.

2. All fines and forfeitures in the criminal cases have been sent to the Defendant herein, and the Defendant now has the same in his possession and control.

3. The Plaintiff, pursuant to Section 46-0-219, obtained certificates from the Judges who presided at the hearings at each of the criminal cases. The Certificates of the Judges, in each case, read in part as follows:

> TO THE STATE TREASURER OF THE STATE OF UTAH:
>
> I, ..., one of the Judges of the District Court of Weber County, State of Utah, hereby certify:
>
> 1. That the prosecution of the above entitled case was initiated by officers of Ogden City, and the evidence was obtained by and at the expense

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of said Ogden City, and officers of Ogden City assisted in the successful prosecution of said case, and as provided by Section 46-0-219, Utah Code Annotated, 1943, all fines, forfeitures or costs paid to you as the result of said prosecution should be paid to Ogden City.

2. It is therefore recommended that all fines, forfeitures, and costs received by you in this case be paid to Ogden City.

Dated this ..... day of September, 1951.

.....
Judge

I, the Chairman of the Utah State Liquor Commission, hereby approve the payment of all fines, forfeitures and costs received in the above entitled case to Ogden City.

.....
Chairman
Utah State Liquor Commission

(Exhibits 1, 2, 3, 4, 5)

It is to be noted that the Judge in each case certified that "officers of Ogden City *assisted* in the successful prosecution of said case" and made a recommendation that the fines, forfeitures and costs be paid to Ogden City.

4. The Chairman of the Utah State Liquor Control Commission, in writing approved the payment of all said

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fines, forfeitures and costs to Ogden City. (Exhibits 1, 2, 3, 4, 5.)

5. There is no evidence in the record as to any hearing had by the Judges of the District Court of Weber County before issuing of the certificates.

6. Certificates of the various Judges of the Second Judicial District Court state that the various criminal cases were initiated by officers of Ogden City, and it is a fair inference that all of the defendants in said cases were bound over to the District Court for trial. However, as to the other facts contained in paragraph 6 of Plaintiff's Brief, there is no evidence in the record.

7. There is no evidence in the record as to what assistance the attorneys for Ogden City may have given the District Attorney in the prosecution of the various criminal cases set forth in paragraph 3 of Plaintiff's complaint, nor is there any evidence concerning how much work the District Attorney had to do in preparing and prosecuting the cases.

8. Demand has been made by the plaintiff on the defendant for remittance to it of all fines and forfeitures he has received from the five criminal cases, and the defendant has refused to make said remittance.

9. Certain additional facts have been pleaded into the record by the defendant in this case which briefly are as follows:

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On December 9, 1938, the then State Auditor Jay W. Guy requested an opinion from the Honorable Joseph Chez, Attorney General of the State of Utah, concerning an interpretation of Chapter 43, Section 177, Laws of Utah 1935, which is now codified as 46-0-219 Utah Code Annotated 1943 (Exhibit 6). In response to this request, the Attorney General issued a series of three opinions, Exhibits 7, 8 and 9, interpreting the provisions of Section 46-0-219. Defendant has also alleged (which for the purpose of this case must be taken as true), that the Defendant and his predecessors in office have at no time refunded any fines and forfeitures imposed under the Liquor Control Act by District Courts of the State of Utah. Defendant has also alleged, that the cities, towns and counties of the State of Utah have acquiesced in the interpretation of the Attorney General of Section 46-0-219 Utah Code Annotated 1943, continuously since the year 1939. It is submitted that upon this limited set of facts, and such facts as the Court may take judicial notice of, are the factual basis for a determination herein.

STATEMENT OF POINTS

POINT I.

THE WORDING OF SECTION 46-0-219 UTAH CODE ANNOTATED 1943, IS SO AMBIGUOUS AS TO REQUIRE STATUTORY CONSTRUCTION AND BY THE EXPRESS WORDS OF SAID SECTION IT IS NOT CLEAR THAT PLAINTIFF IS ENTITLED TO BE PAID THE FINES IN DEFENDANT'S HANDS.

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POINT II.

WHILE OPINIONS OF THE ATTORNEY GENERAL ARE NOT CONTROLLING, THEY ARE ENTITLED TO GREAT RESPECT IN CONSTRUING AN AMBIGUOUS STATUTE.

POINT III.

OGDEN CITY IS A CITY OF THE STATE OF UTAH AND AS SUCH HAS ACQUIESCED IN THE ADMINISTRATIVE INTERPRETATION OF SECTION 46-0-219 UTAH CODE ANNOTATED 1943.

POINT IV.

THE LEGISLATURE OF THE STATE OF UTAH HAS ACQUIESCED IN THE ADMINISTRATIVE CONSTRUCTION PLACED UPON SECTION 46-0-219 UTAH CODE ANNOTATED 1943.

ARGUMENT

POINT I.

THE WORDING OF SECTION 46-0-219 UTAH CODE ANNOTATED 1943, IS SO AMBIGUOUS AS TO REQUIRE STATUTORY CONSTRUCTION AND BY THE EXPRESS WORDS OF SAID SECTION IT IS NOT CLEAR THAT PLAINTIFF IS ENTITLED TO BE PAID THE FINES IN DEFENDANT'S HANDS.

Section 46-0-219 Utah Code Annotated 1943, reads as follows:

> All fines and forfeitures levied under this act shall be paid to the state treasurer and credited to the general fund; *provided, however,* that in all cases where violations of this act are prosecuted to a conviction by the officer of any town, city or

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> county the judge of the court wherein such prosecution took place shall certify to the state treasurer that such prosecution was conducted by the officers of such town, city or county, and the state treasurer, on the written approval of the chairman of the commission, shall pay to said town, city or county all amounts collected as fines, forfeitures or costs as the result of such prosecution.

There are two phrases in the foregoing section which, we submit, are so ambiguous as to require statutory interpretation. The phrase "prosecuted to a conviction by the officer of any town, city or county" and the phrase "prosecution was conducted by the officers of such town, city or county" give rise to the ambiguity in Section 46-0-219 Utah Code Annotated 1943. There can be no doubt under the terms of the statute that all fines and forfeitures levied under the Liquor Control Act should be paid to the State Treasurer and credited to the general fund. It is only which fines should be returned to the towns, cities and counties by the State Treasurer that is not clearly spelled out. Plaintiff asserts that the defendant "refuses to agree that it [the statute] means what it says when it provides that "all" fines growing out of local prosecution (without restriction as to the court of origin) shall be repaid to the local unit." If Section 46-0-219 Utah Code Annotated 1943 made such a provision as the plaintiff asserts; i.e., that all fines growing out of local prosecutions should be returned to the local unit, this controversy would not and could not have arisen. It is only in "all cases where violations of this

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Act are prosecuted to a conviction by the officer of any town, city or county * * *" that the fines and forfeitures shall be returned to the local unit. Had the Legislature intended to have all fines and forfeitures returned to the local subdivisions when the officers of the local units initiated the prosecution or appeared as witnesses in the criminal cases, or, if such officers were associated in the successful prosecution of the criminal cases, it would have been, we submit, a simple matter to so provide. The Legislature, however, did not so provide and therefore it must be determined what the intention of the Legislature was when it provided that fines should be returned "in all cases where violations of this Act are *prosecuted to a conviction* by the officer of any town, city or county."

From a reading of certain sections of the Liquor Control Act it would appear that the Legislature intended that city attorneys would prosecute violations of the Liquor Control Act in the city courts. Section 46-0-206 provides in part:

> If any district, county, city or town attorney, or any peace officer, or any other person has probable cause to believe that alcoholic beverages are possessed, manufactured, sold, bartered, given away or otherwise furnished in violation of this act, or are kept for the purpose of selling, bartering or giving away or otherwise furnishing the same in violation of law, it shall be the duty of such attorney, peace officer or person forthwith to make and file with the judge of the district

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> or city court, or any city, town or precinct justice of the peace, written information supported by his oath or affirmation that he has information and reason to believe that this act is being violated at a certain place, stating the facts within his knowledge; and he shall describe as particularly as may be the place, and the names of the persons, if known, participating in such unlawful act. * * *

The concluding sentence in the foregoing section provides:

> Any peace officer who shall make a seizure of alcoholic beverages or any other property under the provisions of this act shall forthwith report in writing, on forms supplied by the commission, to the prosecuting attorney of the city or county in which such seizure was made, and also to the commission, with detailed information as to the property seized and persons arrested, and the address of the place from which such property was seized.

This section contemplates, at least, that the commencement of searches and seizures of property pursuant to the Liquor Control Act, can be initiated by a city or town attorney in a city court or before town or city justices of the peace. Section 46-0-210 Utah Code Annotated 1943, terminates the jurisdiction of the city court or justice of the peace when it appears that tangible personal property was seized by an officer and the city court or Justice of the peace must certify the record and all files to the District Court of the county in which the premises are situated for further proceedings.

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Section 46-0-216 provides in part as follows:

> "All inspectors appointed under this act, and all sheriffs, deputy sheriffs, mayors, city judges, justices of the peace, constables, marshals and peace officers, and all district county, *city and town attorneys,* and clerks of courts shall diligently enforce the provisions of this act. * * * (Italics added).

and also

* * * *

> "Immediately upon conviction of any person *in any town, city* or county for violation of any provisions of this Act, or for violation of any city ordinace relating to alcoholic beverages, it shall be the duty of the clerk of the court or the justice of the peace to notify the comission of such conviction, giving in writing full particulars of the case on forms supplied by the commission * * *." (Italics added).

The above quoted portions of Section 46-0-216 Utah Code Annotated 1943, would seem to indicate that the Legislature intended that city attorneys would prosecute violations of the provisions of the Liquor Control Act in the city courts, in which case the fines could be returned to the city.

Sections 46-0-247 and 248 impose the duty of enforcement of the Liquor Control Act on all city, posecuting and peace officers. The Legislature, in these two sections, we submit, assume that a city prosecuting officer was different than a city peace officer.

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While the foregoing quoted sections do not spell out a clear cut procedure insofar as city attorneys and city courts are concerned, we submit that the Legislature contemplated that the violations of the Liquor Control Act could be prosecuted by a city attorney and thus Section 46-0-219 is not a nullity as far as the cities and towns are concerned. The Legislature contemplated that control of the possession, sale and transportation of alcoholic beverages would be enforced by the Liquor Control Commission. Section 46-0-48(e) imposes such duty on the Liquor Control Commission and this fact is not altered by the abolition of the Liquor Commission's enforcement unit by executive fiat. The Legislature also imposed the duty of enforcement of the Liquor Control Act upon all city, county, precinct and state executive, prosecuting and peace officers. Plaintiff's assertion that the enforcement of criminal laws must be made financially worth while to legal subdivisions of the State, we submit, is without basis in reason, or in fact. All such officers are bound by the statutes and by their oaths of office to enforce the laws and to say that such local units must be reimbursed under Section 46-0-219 Utah Code Annotated 1943, in order to make them more enthusiastic about expending their money and time and efforts in Liquor Control activities is a fiction which this state should not, and cannot adopt.

Plaintiff asserts that the Legislature has set forth three controlling factors in the matter of remittance of fines and forfeitures: (1) Prosecution to a conviction by officers of a town, city or county; (2) Certification

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of that fact to the State Treasurer by the Judge of the court wherein such prosecution took place; and (3) Written approval by the Chairman of the Liquor Commission of the remittance to the town, city or county of said fines and forfeitures. We think this is a fair interpretation of the statute. However, we submit that the Attorney General's opinion that fines imposed by the District Courts is only a test which the Attorney General advised the auditor to use in making his examinations, and that if a violation of the Liquor Control Act is prosecuted in a district court of the State of Utah that such prosecution cannot and is not "prosecuted to a conviction by the officers of a town, city or county.

The plaintiff asserts that the defendant admits that condition No. 2 has been complied with. Such, we submit, is not the case. The defendant in paragraph 4 of his Answer, denied that the several Judges of the Court wherein such prosecutions took place certified to the defendant that such prosecutions were conducted by the officers of Ogden City. The defendant alleged that the Judges of the District Court wherein the prosecutions took place executed certificates that the officers of Ogden City *assisted* in the successful prosecution of the cases and included as exhibits Exhibits 1, 2, 3, 4 and 5 copies of the said certificates.

It can, we believe, be fairly assumed that grave doubts existed in the minds of the various District Court Judges as to whether the officers of Ogden City did prosecute these cases to a conviction. The certificate

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with regard to the initiating of the cases by officers of Ogden City, and with regard to the evidence being obtained by, and at the expense of Ogden City is a nullity under the plaintiff's theory of the case. Such certification as to these matters need not have been made. The only thing which the Court need certify to is "that such prosecution was conducted by the officers of said town, city or county * * *." We submit that the plaintiff must fail in this action if for no other reason than that the Certificate of the District Court Judges does not properly certify that the conviction was conducted by the officers of Ogden City. Such certificate, on its face, merely states that the officers of Ogden City assisted in the successful prosecution of the case and this, we submit, is not sufficient. Fundamentally, however, it will be of great assistance if the Court will decide the issue which was intended to be presented, and and give a judicial interpretation of the words "prosecuted to a conviction" and "prosecution was conducted by the officers of said town, city or county." It is submitted that the only practical interpretation which can be placed upon these words is the interpretation which the Attorney General arrived at in 1939 which is that if a violation of the Liquor Control Act is prosecuted in the District Court, that of necessity such prosecution was conducted by the District Attorney who is a state officer and not an officer of any town, city or county.

POINT II.

WHILE OPINIONS OF THE ATTORNEY GENERAL ARE NOT CONTROLLING, THEY ARE ENTITLED TO GREAT RESPECT IN CONSTRUING AN AMBIGUOUS STATUTE.

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Admittedly any opinion of the Attorney General, no matter of how long a standing, is not binding upon the Court. However, we submit that the Court should give great weight to the opinions of the Attorney General which in this case, have been consistently followed for a period in excess of thirteen years. The United States Circuit Court of Appeals in the case of Badger v. Hoidale, 88 F. (2d) 208, 109 ALR 798, considered the weight which should be given to an opinion of the attorney general with regard to the interpretation to be given an amendment to the Minnesota Constitution and held:

> "* * * This opinion is, of course, not binding on this court, but it is entitled to great respect and should not be departed from lightly. Standard Computing Scale Co. v. Farrell (D.C.) 242 F. 87."

The court further stated with regard to a statement of the attorney general concerning the amendment:

> "This statement, furnished by the Attorney General in the performance of his public duty, is entitled to consideration. Yosemite Lumber Co. v. Industrial Acc. Comm., 187 Cal. 774, 204 P. 226, 20 ALR 994; Beneficial Loan Society v. Haight, 215 Cal. 506, 11 P. (2d) 857; Bearden v. Collins, 220 Cal. 759, 32 P. (2d) 604."

True it is that the opinions of the Attorney General do not cite any authority, and there was some uncertainty in the mind of the State Auditor when the opinions were written. However, in the last opinion of the Attorney

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General, issued April 18, 1939, (Exhibit 9), the Attorney General stated:

> "No payment may be made to a town, city or county under the provisions of said section 177 for the reason that the prosecuting officer of the town, city or county, appeared in the court to prosecute the case."

The Attorney General took the view that where a prosecution was conducted in the district courts that the district attorney was prosecuting the case and that anyone appearing in the district court would be appearing on behalf of the district attorney. Such interpretation of the statute, we submit, gives various officials who must be guided by the statute a clean cut practical interpretation of the statute. The various court clerks, city, county and state auditors and the state treasurer must, of necessity, have some guide to follow. This, we submit, was what the Attorney General attempted to give them and that even though no authority was cited by the Attorney General, we submit that his reasoning was sound and should not be lightly overturned. A number of situations might be envisioned whereby the state treasurer or a judge having to decide the matter in order to make his certificate would be in grave doubt as to who prosecuted the case if the broad, liberal interpretation asserted by the plaintiff herein were followed; that is if the word "prosecuted" was intended by the Legislature to mean any assistance given to the district attorney in the prosecution of the case. For instance, if an inspector of the Liquor Control Commission requested the aid of city

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peace officers and the county sheriff in conducting a raid on an establishment where it was known that liquor was being sold, it would then be necessary for all of the peace officers conducting the raid to appear as witnesses—as prosecuting witnesses—in conducting the prosecution to final conviction. Now, can it be said that the officer of any particular political subdivision conducted the prosecution to a conviction? We submit not. The only appropriate test which should be applied as to whether the fine shall be returned to the political subdivisions or not is to consider the Court in which such prosecutions took place, and to consider who in fact conducted the prosecution. Insofar as prosecutions in the district court, we submit that the district attorney by law and by custom is the one who conducts the prosecution to final conviction. Admittedly a situation might arise whereby the officers of a county could prosecute to final conviction in the district court, a violation of the Liquor Control Act. Such a situation might be where a sheriff of a county makes an arrest pursuant to the provisions of the Liquor Control Act, the county attorney conducts the preliminary hearing before the magistrate and then, at the request of the district attorney, prosecutes the violation to conviction. In such a situation, the fines or forfeitures collected in the case should properly be returned to the county.

In view of the broad duty imposed on city attorneys by provisions of the Liquor Control Act, it is submitted that a city attorney could, with permission of the county and district attorney prosecute to a conviction a viola-

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tion of the Liquor Control Act both before the committing magistrate and on appeal, or trial in the district court. These situations have not, insofar as the record shows, ever arisen in the State of Utah and certainly at the time the former Attorney General wrote his opinion, he contemplated that all prosecutions for violations of the Liquor Control Act which were prosecuted in the district court would be under the direction of the district attorney. We submit, therefore, that the interpretation which should be given this statute, at least insofar as the district courts are concerned, is that unless it be made to appear by the certificate of the Judge of the District Court that the city attorney prosecuted the violation of the Liquor Control Act to a conviction in his court, that it must be assumed that the prosecution was conducted by the district attorney and the fines cannot be remitted to the city. This would be true even though city peace officers as distinguished from the city prosecuting officer appeared as a witness in the prosecution.

POINT III.

OGDEN CITY IS A CITY OF THE STATE OF UTAH AND AS SUCH HAS ACQUIESCED IN THE ADMINISTRATIVE INTERPRETATION OF SECTION 46-0-219 UTAH CODE ANNOTATED 1943.

The defendant has alleged (which for the purpose of this decision must be taken as true) that at no time have any fines or forfeitures imposed by the district courts of the State of Utah been refunded and that the cities and towns and counties of the State of Utah have

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acquiesced in the interpretation placed on the said section by the attorney general. This, we submit, is a contemporaneous interpretation of the statutes and is entitled to great weigth. The rule is set forth in 50 Am. Jur., 309, Section 319, as follows:

> "It has been said that the best construction of a statute is that which it has received from contemporary authority. 'Optima est legum inter pres consuetudo.' In any event, if there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, are the strongest evidence that it has been rightly explained in practice. The practical construction given a statute for a long period of time has been considered strong evidence of the meaning of the law. Such contemporaneous or practical construction is treated by the courts as of importance, and is entitled to great weight, respect, and persuasive influence. Indeed, the practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one. * * *"

This rule was recognized by the Utah Supreme Court in the case of E. C. Olsen Company v. State Tax Commission, 109 Utah 563, 168 P. (2d) 324.

Plaintiff has asserted that Ogden City has not acquiesced in the administrative construction placed upon Section 46-0-219 Utah Code Annotated 1943. It further asserts that Ogden City cannot be bound by other cities. The only indication in the record with regard to the

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acquiescence of Ogden City is the allegation of the defendant that the "towns, cities and counties have acquiesced in such interpretation continuously since the year 1939." We further submit that the Court can take judicial notice of the fact that Ogden City is a city of the State of Utah. Plaintiff asserts in its brief that as far as its counsel has been able to learn that these cases are the first cases which Ogden City officers have prosecuted in the District Court under the Liquor Control Act. We would submit that this information is not a part of the record in this case and we further submit that it is practically impossible that the peace officers of Ogden City would have gone for a period of thirteen years without ever making an arrest which resulted in a prosecution in the District Court for a violation of the Liquor Control Act. The administrative construction which the defendant has followed in this case, we submit, is the only practical construction of the statute and that there has been a long well established, well known administrative interpretation in this matter, and that Ogden City has acquiesced in the same.

True it is that before a Court need apply any rules of statutory construction, the language of the statute in question must be so ambiguous as to require statutory construction. In this case there can be little doubt that the words "prosecuted to a conviction" are ambiguous. Plaintiff has cited no authority which proved helpful to the Court in determining what this would mean, and the defendant has been unable to find any case directly construing such words, or any case which would prove

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particularly helpful in determining what such words mean.

Numerous definitions of the words "prosecution" and "prosecuted" are set forth in Volume 34 Words and Phrases page 615 et seq. These definitions would seem to indicate that the word "prosecution" is a criminal proceeding at the suit of the government and is conducted by a prosecuting attorney. The North Dakota Supreme Court in the case of State v. Rozum, 80 N.W. 477, 479; 8 N.D. 548, had occasion to construe the word "prosecution" which was used in a statute similar to 46-0-222 Utah Code Annotated 1943. In that case the court held:

> "* * * but as used in the statute, the word 'prosecution' does not mean the making of a complaint merely but means a criminal action."

We submit, Therefore, that Ogden City being a city of the State of Utah has acquiesced in such interpretation of the word "prosecution" for a period in excess of thirteen years and that such interpretation should now be adopted by this court.

POINT IV.

THE LEGISLATURE OF THE STATE OF UTAH HAS ACQUIESCED IN THE ADMINISTRATIVE CONSTRUCTION PLACED UPON SECTION 46-0-219 UTAH CODE ANNOTATED 1943.

Section 46-0-219 Utah Code Annotated 1943, was first passed by the Legislature in the year 1935 as Section 177, Laws of Utah 1935, Chapter 43. No amendment

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has been made to this section since that time although the Legislature has from time to time amended other sections of the Liquor Control Act.

The United States Supreme Court in the case of United States v. Farrar, 281 U. S. 624; 74 L. Ed. 1078, had occasion to announce a rule which we submit is applicable in this case. The Court held as set forth in the headnote:

> "The fact that a construction, during a period of ten years, by the executive departments charged with its administration and enforcement, of the provisions of the National Prohibition Act relative to the issuance of permits for the purchase of liquor, as not including the ordinary purchaser, has been acquiesced in by Congress, is evidence of the correctness of such construction."

See also Van Dyke's Appeal, 217 Wis. 528; 259 N.W. 700, wherein the Court held:

> "The inference that an administrative construction of a state income tax law as warranting the inclusion in taxable income of interest on nontaxable highway improvement bonds is correct may be drawn from the failure of the legislature during a period of several years to change such construction by amending the statute."

The Legislature of the State of Utah, we submit, has acquiesced in the interpretation placed on the statute by the Attorney General in 1939, and such acquiescence,

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while not binding on the Court, should be given great weight in the interpretation of Section 46-0-219 Utah Code Annotated 1943.

CONCLUSION

In view of the foregoing authorities and argument, we submit that this Court should construe the words "prosecuted to a conviction" and "prosecution was conducted by the officers of such city, town, or county * * *" to mean that only in cases where violations of the Liquor Control Act are prosecuted to a conviction by the prosecuting attorney of any city, town or county that the fines imposed should be remitted to the local unit.

WHEREFORE, defendant prays that the alternative writ heretofore issued be dismissed.

Respectfully submitted,

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